

**STATE OF NEW JERSEY  
BOARD OF PUBLIC UTILITIES**

**In the Matter of the Ownership of :  
Renewable Energy Certificates ("RECs") :  
Under the Electric Discount and Energy :  
Competition Act, as it Pertains to : BPU Docket No. EX04080879  
Non-Utility Generators and the Board's :  
Renewable Energy Portfolio Standards :**

Comments of  
Atlantic City Electric Company  
September 23, 2004

These comments are being submitted behalf of Atlantic City Electric Company d/b/a Conectiv Power Deliver ("Conectiv"), to the New Jersey Board of Public Utilities ("BPU" or "Board"), in response to the Board's Order of August 27, 2004 in the within matter. The Board has requested comments on three questions related to the ownership of "Renewable Energy Certificates" ("RECs") under the Electric Discount and Energy Competition Act ("EDECA") and the Board of Public Utilities' Renewable Energy Portfolio Standards ("RPS"), N.J.A.C. 14:4-8.1 et seq. Atlantic takes the position that the Board does have jurisdiction to decide this issue, and that such RECs are transferred under contracts entered into by the utilities under the Public Utility Regulatory Policies Act of 1978<sup>1</sup> ("PURPA").

The first question is: "Does the State have jurisdiction to decide the issue of the ownership of RECs?" Before addressing the federal law basis for concluding that New Jersey does have this jurisdiction, it is important to note that any RECs which do exist, are created under state law in New Jersey and given effect by actions of the BPU. As called for in EDECA (at N.J.S.A. 48:3-87(d)), the Board adopted its Interim Renewable

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<sup>1</sup> 16 U.S.C. § 824a-3 (2000).

Energy Portfolio Standards in 2001. The current RPS rules require that “[e]ach supplier/provider, as defined at N.J.A.C. 14:4-8.2, that sells electricity to retail customers in New Jersey, shall include in its electric energy portfolio electricity generated from renewable energy sources.” N.J.A.C. 14:4-8.1(a). In the regulations, “renewable energy” is defined as follows, consistent with EDECA:

"Class I renewable energy" means electric energy produced from solar technologies, photovoltaic technologies, wind energy, fuel cells powered by renewable fuels, geothermal technologies, wave or tidal action, and/or methane gas from landfills or a biomass facility, provided that the biomass is cultivated and harvested in a sustainable manner. Types of class I renewable energy that qualify for use in meeting the requirements of this subchapter are set forth at N.J.A.C. 14:4-8.5.

"Class II renewable energy" means electric energy produced at a resource recovery facility or hydro power facility, provided that such facility is located where retail competition is permitted and provided further that the Commissioner of Environmental Protection has determined that such facility meets the highest environmental standards and minimizes any impacts to the environment and local communities. Types of class II renewable energy that qualify for use in meeting the requirements of this subchapter are set forth at N.J.A.C. 14:4-8.6.

N.J.A.C. 14:4-8.2.

The Board incorporated the concept of a REC into its rules when it adopted revisions on April 19, 2001. *See* 35 N.J.R. 4445(a), 36 N.J.R. 2053(b):

"Renewable Energy Certificate" or "REC" means a certificate representing the environmental benefits or attributes of one megawatt-hour of generation from a generating facility that meets the requirements of this subchapter. There are three kinds of RECs--class I RECs, which represent the environmental benefits or attributes of one megawatt-hour of class I renewable energy generation; class II RECs, which represent the environmental benefits or attributes of one megawatt-hour of class II renewable

energy generation; and solar RECs, which represent the environmental benefits or attributes of one megawatt-hour of solar electric generation.

Under Section 14:4-8.8:

(a) a supplier/provider may choose to submit one or more renewable energy certificates or RECs as defined in N.J.A.C. 14:4-8-2, in lieu of supplying the percentage of renewable energy required under [another provision of the regulation].

The BPU has asked that these comments discuss the FERC's recent order in the *American Ref-Fuel Company* matter<sup>2</sup>, regarding the issue of REC ownership. FERC could not have been clearer in its holding that REC ownership is chiefly a matter of state law:

What is relevant here is that the RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA. \* \* \*

While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA [Emphasis added].<sup>3</sup>

Under EDECA and the RPS regulations, a generator may not sever the renewable attributes of energy produced from Class I and Class II renewable energy resources, from the output itself. EDECA refers to “*the kilowatt hours sold* in this state by each electric

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<sup>2</sup> *American Ref-Fuel Company et al.*, 105 FERC ¶ 61,004 (2003), rehearing denied 107 FERC ¶ 61,016 (2004), appeal pending in Case No. 04-1182, U.S. Court of Appeals, D.C. Circuit.

<sup>3</sup> *American Ref-Fuel Company*, 105 FERC ¶ 61,004, at Para. 23.

power supplier and each basic generation service provider.” N.J.S.A. 48:3-87(d) (emphasis added). The regulations require electric suppliers to “include in its *electric energy portfolio energy* generated from renewable energy sources” (emphasis added). N.J.A.C. 14:4-8.1. Thus, since in creating the RECs New Jersey makes the environmental attributes a part of the sale of energy, then the contract purchaser of the energy also owns the REC. Therefore, it is clear that under the legislative scheme and the current regulations, a sale of *energy* from a renewable energy resource includes all the environmental attributes of such energy.

In the case of Atlantic, its Qualifying Facility ("QF") contracts were entered into as part of a Standard Offer Process which was initiated as a result of a 1987 Stipulation with the Staff of the BPU. In that Stipulation, preference was given for the development of renewable resource projects, along with other QF technologies. Pursuant to the Standard Offer implemented by that Stipulation, Atlantic entered negotiations with, and ultimately executed a contract with a resource recovery facility (a "Class II renewable energy" supplier).

As part of the Standard Offer process resulting from the Stipulation, Atlantic entered into Board-approved contracts, which among other things show the importance of the QF status of the seller. For a resource recovery facility, this demonstrates the importance that the output be eligible for classification as output from a renewable resource. Specifically, Atlantic's contract requires, at Section 3.2(b) of that contract, that seller maintain QF status for the term of the agreement. Loss of QF status would result in a *reduction* to the purchase price for the output. To put it another way, if the output did not qualify as a renewable resource from a QF, then the generator would receive *less*

*money* for that output. Atlantic (and its customers) are paying for, not simply energy and capacity, but *energy and capacity from a renewable resource QF*. This constitutes an "express provision in the contract", in the words of the *Ref-Fuel* decision.

The above facts demonstrate, first, that RECs are created by New Jersey as part of the energy sold, and second, that New Jersey has specifically implemented QF contracts which pay more for output from a renewable resource QF, than from a non-QF. This shows the clear interest of the state in deciding this issue.

The Board has also asked: Assuming the ownership of State-created RECs is an issue to be determined by the State, is this a regulatory issue to be decided by the Board, pursuant to its Title 48 authority, or is this a contract issue to be decided by the courts? As discussed above, since the RECs themselves were created by action of the New Jersey BPU, pursuant to EDECA, and since contracts entered into by New Jersey utilities were under the jurisdiction of the Board as part of its efforts to encourage the development of renewable resource QFs, it is clear that the intent of the contract must be the subject of a determination by this Board, as well. As the example of Atlantic's resource recovery QF contract shows, this was not simply a two-party agreement, in which the terms were arrived at solely by negotiations between those parties. Instead, the existence of negotiations, the pricing available to the QF, and significant terms available to the QF because of its status as a renewable resource, all have their source in the intent of the BPU to encourage the development of this type of resource. Furthermore, the BPU determined that customers of Atlantic were to have an absolute commitment to pay for the output from this renewable resource, because of the benefits which the Board determined to exist as a result of the existence of that resource. Because of these factors,

it clearly is the intent of the Board which is important in rendering a determination regarding the ownership of State-created RECs.

In addition, the Board's jurisdiction to render this determination is consistent with its authority to ensure that Atlantic's customers (and the customers of any other electric utility with a similar contract with a resource recovery QF) receive the benefits for which they are paying under a board-approved QF contract. Finally, the Board has continuing authority to review any modifications to these QF contracts; if the parties to the contract negotiate a change with respect to ownership of the environmental attributes, that change is subject to the review and approval of the Board. Given this clear interest and authority of the Board over these QF contracts, the Board is the proper forum for this determination.

The third question to be addressed is: Assuming this is a regulatory issue to be decided by the Board, what factors should the Board consider? As noted in the above discussion, there are significant factors which the Board should consider, and the most significant factor is that the Board itself encouraged contracts between New Jersey's electric utilities and renewable resource facilities. In doing so, the Board directed that a renewable resource QF would be paid more for its output, than if it was not a QF. This fact, that customers are paying a premium for output which qualified for REC treatment, shows that the environmental attributes are properly transferred with the purchase of the output. If the Board did not consider this significant factor, then there is a risk that customers could pay *twice* for the same renewable resource attributes - once under the QF contract's pricing terms, and again if the renewable attributes are not transferred with the output. To the extent this factor is not present, or if a QF wished to negotiate different

pricing terms in exchange for retaining the environmental attributes, these factors can also be considered by the Board.